Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

(23)

No. 95-388

In the Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, ET AL., PETITIONERS,

v.

PRO FOOTBALL, INC., D/B/A WASHINGTON REDSKINS, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. ("ATA"), a not-for-profit corporation, is a trade association consisting of motor carriers, state trucking associations, and national trucking conferences. Its membership includes more than 4,500 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents more than 35,000 member companies and every type and class of motor carrier operation in the United States.

ATA was created to promote and protect the interests of the trucking industry. It regularly appears in this Court and other courts to present the views of the trucking industry. ATA submitted a brief as *amicus curiae* in the seminal multiemployer bargaining case of *NLRB* v. *Truck Drivers Local No. 449* (*"Buffalo Linen"*), 353 U.S. 87 (1957), and has been involved as *amicus* in labor law and other cases in this Court. See, *e.g., ABF Freight Sys., Inc.* v. *NLRB*, 114 S. Ct. 835 (1994).

A number of unionized motor carrier members of ATA collectively bargain with their employees' union through multiemployer bargaining units pursuant to the National Labor Relations Act. The largest multiemployer unit in the trucking industry consists of 24 less-than-truckload motor carriers whose collective bargaining agreement covers approximately 120,000 workers. Another large multiemployer unit includes 17 automobile transport companies with approximately 12,000 employees. See also *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 713 n.20 (1965) (opinion of Goldberg, J.) ("trucking" is one of the "important industries" where multiemployer bargaining occurs).

Although individual trucking companies may have different reasons for participating in multiemployer bargaining units, one prevalent reason is to counter the bargaining strength of the International Brotherhood of Teamsters, a union of 1.8 million members that represents the majority of employees in the unionized segment of the trucking industry. See *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404, 409 n.3 (1982) ("'[m]ultiemployer bargaining * * * enables smaller employers to bargain "on an equal basis with a large union"'") (citations

omitted). Unlike professional sports franchises and leagues such as respondents in this case, which have special needs for uniformity in collective bargaining, trucking companies have considerable business discretion in selecting the appropriate mode of bargaining and may join or withdraw from multiemployer bargaining units based on the relative advantages and disadvantages of those alternatives.

ATA has a strong interest in the outcome of this case. A number of its members currently engage in multiemployer bargaining. Moreover, the decision whether or not to participate in multiemployer bargaining is based on the competing advantages and disadvantages of such bargaining units, including the potential antitrust risks that multiemployer bargaining entails. Accordingly, ATA's members are directly affected by the decision below on the scope of the nonstatutory labor exemption to the antitrust laws in the context of multiemployer bargaining, and in particular whether a multiemployer bargaining unit's imposition of terms of employment at impasse in the collective bargaining process is subject to Section 1 of the Sherman Act. In addition, because employers may have different reasons and enjoy greater flexibility in deciding whether to join a multiemployer bargaining unit in the trucking industry than in a professional sports league, ATA's participation as *amicus curiae* will give the Court a broader perspective on the important legal question presented in this case. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

A multiemployer bargaining unit's imposition of terms at impasse is an integral part of the collective

bargaining process under the National Labor Relations Act. Federal labor law governs both the propriety of employer conduct at impasse and the operations of multiemployer bargaining units, and it clearly covers the challenged activity in this case. Petitioners' attempt to apply the rules and remedies of the antitrust laws to that conduct is irreconcilable with the established system of federal labor law and, if accepted by this Court, would seriously impair national labor policy.

Petitioners have advanced no reason to subject such collective bargaining activity to antitrust scrutiny. Contrary to their argument for a narrow construction, this Court has recognized that the nonstatutory labor exemption is "a broad * * * exemption from the antitrust laws" (*Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 539 (1983)), and in no event should it be narrower than is appropriate to effectuate its purposes.

Petitioners also are incorrect that the exemption is restricted to collective bargaining agreements themselves. This argument ignores the elemental principle that the NLRA protects the collective bargaining *process*. Nor does impasse mark the termination of the process; rather, it is simply a temporary suspension of negotiations that typically is overcome, and it represents a critical phase in the strategic and economic contest between management and labor. Finally, exclusion of this collective bargaining conduct from the exemption would pose enormous practical difficulties and would improperly disrupt collective bargaining and discourage multiemployer units.

Accordingly, a multiemployer bargaining unit's use of the self-help weapon of imposing terms at impasse is part and parcel of the collective bargaining process under the NLRA and falls squarely within the nonstatutory labor exemption.

ARGUMENT

A MULTIEMPLOYER BARGAINING UNIT'S IMPOSITION OF TERMS AT IMPASSE IN THE COLLECTIVE BARGAINING PROCESS IS PROTECTED BY THE NONSTATUTORY LABOR EXEMPTION TO THE ANTITRUST LAWS.

I. THE LAWFULNESS OF A MULTIEMPLOYER BARGAINING UNIT'S IMPOSITION OF TERMS AT IMPASSE IS GOVERNED BY FEDERAL LABOR LAW AND IS NOT SUBJECT TO THE ANTITRUST LAWS.

At issue in this case is conduct that is an integral part of the collective bargaining process: a multiemployer bargaining unit's imposition of terms and conditions of employment in response to an impasse in bargaining with the union. Nevertheless, petitioners, supported by the federal antitrust enforcement authorities, seek to have courts and juries scrutinize that conduct under the antitrust laws and to impose treble damages on the members of the multiemployer unit for collective actions taken in the course of the bargaining process. As the court below correctly concluded, interjection of antitrust rules and remedies into the collective bargaining process in that way would impair the policies of the federal labor laws and would be irreconcilable with the fundamental

principles underlying the nonstatutory labor exemption that this Court has recognized for half a century.[1]

The nonstatutory labor exemption reflects "a proper accommodation between the congressional policy favoring collective bargaining under the [National Labor Relations Act] and the congressional policy favoring free competition in business markets [under the antitrust laws]." *Connell Constr. Co.* v. *Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622 (1975). The exemption thus serves to "harmoniz[e] the Sherman Act with the national policy expressed in the National Labor Relations Act." *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965). This "harmon[y]" between the federal labor and antitrust laws requires that the labor exemption encompass the imposition of terms by a multiemployer bargaining unit at impasse.[2]

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[1] As the court of appeals explained, and as is undisputed in this Court, the multiemployer conduct challenged here was "lawful under the labor laws," and "primarily affect[s] only a labor market" and "has no anti-competitive effect on the product market." Pet. App. 10a, 16a. Accordingly, this case is not controlled by the Court's previous decisions holding that the nonstatutory labor exemption does not apply to employer-employee activities that are outside the proper scope of the labor laws and restrain competition in a product market. See, *e.g.*, *Connell Constr. Co.* v. *Plumbers & Steamfitters Local No. 100*, 421 U.S. 616 (1975); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); compare *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965) (upholding nonstatutory labor exemption).

[2] We note that the most recent cases on this issue in the courts of appeals, which have involved a wide array of judges (including several well known for their expertise in labor and antitrust law), have all agreed that the nonstatutory labor exemption applies to the activities of multiemployer bargaining units in the collective bargaining process. See, *e.g.*, Pet. App. 3a (Edwards, C.J., joined by Randolph, J.); *National Basketball Ass'n* v. *Williams*, 45 F.3d 684 (2d

1. It is clear that federal labor law regulates a multiemployer bargaining unit's imposition of terms of employment at impasse in collective bargaining. Multiemployer bargaining units are well established under the federal labor laws and play an important role in collective bargaining. As this Court explained in *NLRB* v. *Truck Drivers Local No. 449* (*"Buffalo Linen"*), 353 U.S. 87, 94-95 (1957):

> Multi-employer bargaining long antedated the Wagner Act * * *.
>
> [In enacting the Taft-Hartley amendments,] Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining.

The Court has recognized the many interests of both employers and employees that multiemployer bargaining serves:

> "Multiemployer bargaining offers advantages to both management and labor. It enables smaller employers to bargain 'on an equal basis with a large union' and avoid 'the competitive disadvantages resulting from non-uniform contractual terms.' At the

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Cir. 1995) (Winter, J., joined by Pratt & Calabresi, JJ.), petition for cert. pending, No. 95-137 (filed July 24, 1995); *Powell* v. *National Football League*, 930 F.2d 1293 (8th Cir. 1989) (John R. Gibson, J., joined by Wollman, J.), cert. denied, 498 U.S. 1040 (1991).

> same time, it facilitates the development of industry-wide, worker benefit programs that employers otherwise might be unable to provide. More generally, multiemployer bargaining encourages both sides to adopt a flexible attitude during negotiations; as the Board explains, employers can make concessions 'without fear that other employers will refuse to make similar concessions to achieve a competitive advantage,' and a union can act similarly 'without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers.' Finally, by permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multiemployer bargaining enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife."

Charles D. Bonanno Linen Service, Inc. v. *NLRB*, 454 U.S. 404, 409-410 n.3 (1982) (citations omitted). As the *amicus* filings in the present case attest, "[m]ultiemployer bargaining * * * continue[s] to be the preferred bargaining mechanism in many industries." *Id.* at 410.

With respect to the issue in this case, the subject of impasse in collective bargaining negotiations raises a host of significant and recurring labor law questions. Such questions include both the definition of impasse and the types of employer conduct at impasse that are consistent with labor policy. See, *e.g.*, *NLRB* v. *Katz*, 369 U.S. 736, 745 (1962) (employer's imposition, at impasse,

of terms offered to but rejected by union during negotiations is not an unfair labor practice); *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 318 (1965) (employer's lockout of employees at impasse is not an unfair labor practice); *Bonanno Linen*, 454 U.S. at 412 (definition of impasse). As the cited cases illustrate, these and many other matters concerning impasse are to be resolved under the National Labor Relations Act.

Likewise, federal labor law governs the existence and operation of multiemployer bargaining units. For instance, the labor laws determine the appropriateness of and conditions for multiemployer bargaining, the circumstances in which an employer is allowed to withdraw from the unit, and the propriety of specific multiemployer conduct during the collective bargaining process. See *Buffalo Linen*, *supra* (multiemployer lockout in response to union strike is not an unfair labor practice); *Bonanno Linen*, *supra* (impasse does not justify employer's withdrawal from multiemployer unit, but employer can negotiate individual interim agreement with union); *id.* at 412 (NLRB has accepted multiemployer bargaining "as an instrument of labor peace"); Robert A. Gorman, LABOR LAW 86-89 (1976) (discussing NLRB certification of multiemployer bargaining units).

Nearly forty years ago, this Court anticipated that "inevitable questions concerning multi-employer bargaining [are] bound to arise in the future" (*Buffalo Linen*, 353 U.S. at 96), and multiemployer bargaining has in fact "raised a variety of problems requiring resolution." *Bonanno Linen*, 454 U.S. at 410. Such issues "Congress * * * 'intended to leave to the Board's specialized judgment.'" *Buffalo Linen*, 353 U.S. at 96 (citation omitted).

> The ultimate problem is the balancing of the conflicting legitimate interests [of employers and employees]. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.

Ibid. Under that approach, "the ground rules for multiemployer bargaining * * * have evolved and are still evolving, as the Board, employing its expertise in the light of experience, has sought to balance the 'conflicting legitimate interests' in pursuit of the 'national [labor] policy * * *.'" *Bonanno Linen*, 454 U.S. at 413 (citations omitted). The assessment of "the significance of impasse and the dynamics of collective bargaining" (*ibid.*), in order to promote "the stability of multiemployer units" and avoid "undermin[ing] the utility of multiemployer bargaining" (*id.* at 410, 412), "is precisely the kind of judgment that *Buffalo Linen* ruled should be left to the Board." *Id.* at 413.

Significantly, petitioners and the federal antitrust authorities nowhere contend that a multiemployer bargaining unit's imposition of terms at impasse is not covered by the National Labor Relations Act. Indeed, it is settled law under the Act that an individual employer's right to "institute unilaterally * * * working conditions" at impasse is one of the "tools of economic self-help" available in collective bargaining. *American Ship Bldg. Co.*, 380 U.S. at 316. See also, *e.g.*, *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 675 (1981) ("employer * * * may bargain to impasse * * * and use the economic weapons at [its] disposal to attempt to secure [its] aims"). Federal labor law is no less

applicable to such imposition of terms by a multiemployer bargaining unit.[3]

2. The foregoing analysis makes clear that the lawfulness of a multiemployer bargaining unit's imposition of terms upon impasse critically implicates national labor policy and should be judged under the federal labor laws. To superimpose antitrust processes, rules, and remedies on those applicable under the NLRA, as petitioners urge, would strike at the very heart of the system of labor law and intolerably intrude upon the collective bargaining process.

First of all, under the federal labor laws, "Congress * * * created the National Labor Relations Board to supervise the collective-bargaining process * * * [and] see that the process worked." *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 103 (1970). Congress thus "entrusted * * * [the] administration and development [of national labor law] to a centralized, expert agency" utilizing "'specially designed procedures * * * to obtain uniform[ity]." *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 286, 287 (1971). Petitioners, by contrast, would turn over the formulation and application of rules governing multiemployer bargaining to federal courts and juries sitting in individual antitrust suits across the country. By ignoring this Court's admonition that "'[a] multiplicity of tribunals and a diversity of procedures

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[3] Lower courts have not distinguished under federal labor law between the rights of individual employers and those of multiple employers. See, *e.g.*, *Amalgamated Meat Cutters Union Local No. 576* v. *Wetterau Foods, Inc.*, 597 F.2d 133, 135-136 (8th Cir. 1979); *Kennedy* v. *Long Island R.R.*, 319 F.2d 366, 371-372 (2d Cir.), cert. denied, 375 U.S. 830 (1963).

are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law,'" petitioners' approach improperly "sacrifice[s] important federal interests in a uniform law of labor relations centrally administered by an expert agency." *Id.* at 287, 291 (citation omitted); see also *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

In addition to different tribunals and procedures, petitioners' proposal also would wrench multiemployer bargaining from its moorings in labor law and create a body of substantive rules that bear no relationship to federal labor policies. Under the NLRA, the principles governing multiemployer bargaining are designed to "effectuate national labor policy" (*Buffalo Linen*, 353 U.S. at 96) "in the light of experience" (*Bonanno Linen*, 454 U.S. at 413) based on such practical considerations as "the stability of multiemployer units" and "the dynamics of collective bargaining." *Id.* at 410, 413. Antitrust courts and juries, on the other hand, are guided solely by the principle of economic competition under the often malleable standard of unreasonable restraints of trade. Application of competition-based standards would take no account of the labor law interest in multiemployer bargaining and predictably would forbid collective bargaining activity that the labor laws now permit, *e.g.*, multiemployer lockouts (*Buffalo Linen, supra*) and perhaps the very existence of multiemployer bargaining itself (*Buffalo Linen, supra*; *Pennington*, 381 U.S. at 664). The detriment to national labor policy is manifest.

Lastly, petitioners would substitute the antitrust regime of treble damages (as well as costs and attorneys' fees) for the labor law's remedial scheme of NLRB orders to cease and desist from unfair labor

practices and bargain in good faith. As this Court has recognized, however, "the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act." *Lockridge*, 403 U.S. at 287. See also *id.* at 288-289 n.5 (emphasizing importance of limitations on NLRA's "remedial aspects"). Petitioners' invocation of antitrust remedies would upset the careful remedial balance struck by Congress in the labor laws.[4]

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[4] Notwithstanding petitioners' assertion (Pet. Br. 32), *Connell* is not to the contrary. That case involved conduct that *violated* the labor laws. See 421 U.S. at 634 (conduct was "illegal" under the NLRA); *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 85 (1982). Moreover, the portion of the opinion relied upon by petitioners followed the Court's conclusion that the nonstatutory labor exemption did not apply, and therefore it has no bearing on the issue presented here. Finally, the Court's conclusion that antitrust remedies could be employed in addition to labor law remedies in that case was tied to the particular provision at issue there and is not of general application. See *Connell Constr. Co.*, 421 U.S. at 634 ("[T]he question [is] whether Congress meant to preclude antitrust suits based on the 'hot cargo' agreements that it outlawed in 1959. There is no legislative history * * * suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA"); see also *id.* at 636 n.17 ("in cases like this one, * * * an independent federal remedy [under the antitrust laws] * * * is consistent with the NLRA"). The courts of appeals have understood this part of *Connell* to be narrowly limited. See, *e.g.*, *Richards* v. *Neilsen Freight Lines*, 810 F.2d 898, 906 (9th Cir. 1987) (Kennedy, J.) ("*Connell* does not suggest that every violation of section 158(e) gives rise to an antitrust suit. It is not paradoxical that a labor law violation may still be within the antitrust exemption, for the violation will carry its own remedies under the labor laws"); *Prepmore Apparel, Inc.* v. *Amalgamated Clothing Workers*, 431 F.2d 1004, 1007 (5th Cir. 1970) (conduct that violated

Accordingly, a multiemployer bargaining unit's imposition of terms at impasse is a matter properly left to federal labor law and, under the nonstatutory labor exemption, is not subject to the Sherman Act. The antitrust laws should not be used to take away the economic weapons available to employers in collective bargaining under the NLRA. See *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608, 614-618 (1986); *Lodge 76, International Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 144-148, 153 (1976); see also *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 111 (1989).

II. PETITIONERS HAVE OFFERED NO JUSTIFICATION FOR APPLYING THE SHERMAN ACT IN THIS CASE.

Petitioners and the federal antitrust enforcement authorities do not really take issue with these basic principles. Rather, they assert various grounds why the nonstatutory labor exemption should be inapplicable in this case. None of the reasons they offer, however, justifies the application of the antitrust laws to what is quintessentially a labor law issue.[5]

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the NLRA was exempt from the Sherman Act), cert. dismissed, 404 U.S. 801 (1971).

[5] The government's brief presents the views of the Department of Justice and the Federal Trade Commission but was not filed on behalf of the National Labor Relations Board. In a footnote to the conclusion of its brief, the government cryptically observes that the Board disagrees with the court of appeals' "expansive formulation" of the nonstatutory labor exemption. U.S. Am. Br. 27 n.10. Of course, "this Court reviews judgments, not opinions."

A. The Doctrine Of Narrow Construction Does Not Justify Application Of The Sherman Act.

The principal argument of both petitioners and the government is that exemptions from the antitrust laws should be narrowly construed. However, this Court has recognized that "[f]ederal policy has * * * developed * * * a *broad* labor exemption from the antitrust laws" to reflect the "separate body of labor law specifically designed" to govern employer-employee relations. *Associated General Contractors*, 459 U.S. at 539-540 & n.43 (emphasis added) (citing nonstatutory labor exemption). See also 1 Phillip Areeda & Donald F. Turner, ANTITRUST LAW ¶ 229a at 189 (1978) ("the bulk of labor activities * * * are exempt from the antitrust laws"). Moreover, as the government itself acknowledges (U.S. Am. Br. 16), the general maxim of narrow construction must be tempered by the recognition that, where "both [the Sherman Act and the National Labor Relations Act] cannot be given full effect, * * * the antitrust laws should yield to the more specific, and later enacted, obligations of the NLRA." Finally, the canon of narrow construction of antitrust exemptions is offset here by the equally well-settled canon that the National Labor Relations Act should be given a "liberal statutory construction" and exceptions to it are to be "narrowly construed." 3A Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 73.01 at 319 (5th ed. 1992).

Although exemptions from the antitrust laws should not be needlessly overbroad, they must be

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Chevron U.S.A. Inc. v. *Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).

broad enough to accomplish the purpose of the exemption. As this brief demonstrates, application of the antitrust laws here would be inconsistent with the rationale of the nonstatutory labor exemption. What petitioners and the government propose is not an appropriately focused exemption but an unduly grudging one that frustrates rather than furthers the policies of the exemption. In fact, their approach would call into question the legality of multiemployer bargaining at all. But see *Pennington*, 381 U.S. at 664 ("[w]e think it [is] beyond question" that multiemployer bargaining is not a violation of the Sherman Act).

B. The Nonstatutory Labor Exemption Protects The Collective Bargaining Process And Is Not Confined To Collective Bargaining Agreements.

Petitioners construct an argument that the nonstatutory labor exemption is confined to collective bargaining agreements and therefore does not extend to any allegedly anticompetitive activity outside the agreement itself. All petitioners succeed in establishing, however, is the unexceptionable proposition that the exemption covers such agreements. Nothing in either law or logic supports petitioners' more sweeping assertion that the exemption is *limited* to collective bargaining agreements and applies *only* to those agreements.

Petitioners' argument overlooks the fundamental precept of federal labor law that the NLRA governs and protects the collective bargaining *process*. As this Court repeatedly has explained, "[s]ince 1935 the story of labor relations in this country

has largely been a history of governmental regulation of the process of collective bargaining." *H.K. Porter Co.*, 397 U.S. at 102. Accordingly, "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 753 (1985). See also, *e.g.*, *American Ship Bldg. Co.*, 380 U.S. at 317 (the "central purpose" of the NLRA was to protect "the process of collective bargaining"); *First National Maintenance Corp.*, 452 U.S. at 674 (the NLRA proscribes "conduct by unions and employers that * * * [is] deleterious to the [collective bargaining] process"); *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 20 (1987) ("the NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining"). Petitioners' constricted view of the labor exemption is irreconcilable with this settled understanding of federal labor policy.

Nor does impasse represent the termination of the collective bargaining process. "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken.' * * * Hence, 'there is little warrant for regarding an impasse as a rupture of the bargaining relation.'" *Bonanno Linen*, 454 U.S. at 412 (citations omitted). In fact, as the government points out (U.S. Am. Br. 24), "impasse could occur more than once within the course of a single labor dispute." Moreover, impasse reflects the parties' bargaining strategies and is an occasion for each party to employ the economic weapons at its disposal to induce the other side to accept its bargaining proposals. Thus, "an impasse may be

'brought about intentionally by one or both parties as a device to further * * * the bargaining process,'" and it often is the "'application of economic force'" that breaks an impasse. *Bonanno Linen*, 454 U.S. at 412 (citations omitted); see also *First National Maintenance Corp.*, 452 U.S. at 675. Like other economic weapons available to employers, such as shutdowns and lockouts, a multiemployer bargaining unit's imposition of terms at impasse is an integral part of the ongoing collective bargaining process.[6]

Although they seek to restrict the nonstatutory labor exemption to collective bargaining agreements, petitioners ultimately are forced to concede (Pet. Br. 40) that the exemption extends to such actions as lockouts that are not part of any agreement. This concession is necessary to accommodate the decisions of this Court holding that lockouts are not an unfair labor practice and that their use by multiemployer bargaining units falls within the nonstatutory labor exemption. See *American Ship Building Co., supra; Buffalo Linen, supra.* At the same time, however, it is fatally inconsistent with their central submission that the exemption protects only collective bargaining agreements and not

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[6] This is a complete answer to Judge Wald's dissent below (Pet. App. 51a-58a). In particular, although the unilateral imposition of terms at impasse does temporarily set the substantive conditions of employment during the period until agreement is reached, that does not make it any the less an economic tool that is part of the bargaining process. In this regard, it is no different from a lockout, which is an accepted practice under the labor laws, and which, even if engaged in by a multiemployer bargaining unit, is within the labor exemption. See *Buffalo Linen, supra*, and *American Ship Building Co., supra*. There simply is no basis, either in law or in the practicalities of the collective bargaining process, for Judge Wald's attempted distinction between "terms" and "tactics."

other actions that occur as part of the collective bargaining process.

Petitioners equally fail in their attempt (Pet. Br. 18-30) to predicate the nonstatutory labor exemption on the theory that the employees consent to the multiemployers' allegedly anticompetitive conduct when they sign a collective bargaining agreement. Once again, that argument does not explain such concerted activities as multiemployer lockouts that are protected by the exemption but are not embodied in the eventual agreement. More fundamentally, the exemption does not rest on the notion of employees' assent to anticompetitive practices or waiver of their rights under the antitrust laws. Rather, as the Court has explained, it reflects sound legal principles that "harmoniz[e]" (*Pennington*, 381 U.S. at 665) and "accommodat[e]" (*Connell*, 421 U.S. at 622) the labor and antitrust laws. Petitioners' "consent" argument is made from whole cloth and, other than the proffered virtue of being exceedingly narrow (but see pages 15-16, *supra*), finds no support in the decisions of this Court.[7]

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[7] Contrary to petitioners' assertion (Pet. Br. 22), it is not the case that "most lower courts" have limited the nonstatutory labor exemption to collective bargaining agreements consented to by a union. See pages 6-7 note 2, *supra*.; see also, *e.g.*, *Neilsen Freight Lines*, 810 F.2d at 905 (Kennedy, J.) (holding that "concerted action * * * was protected [by the exemption] although it was outside the context of a collective bargaining relation"); *Amalgamated Meat Cutters*, 597 F.2d at 136; *Long Island R.R.*, 319 F.2d at 372-373. Indeed, under petitioners' view, *Connell* would have been an easy case, and the Court's extensive analysis would have been unnecessary, because it was undisputed that the challenged conduct was not part of a collective bargaining agreement. See 421 U.S. at 625-626, 636; *Neilsen Freight Lines*, 810 F.2d at 905.

Finally, petitioners assert (Pet. Br. 29-30, 34-37, 47) that an employer's imposition of terms at impasse is not part of the collective bargaining process — or indeed of federal labor law — because it arises under state common law. In their view, it merely represents the employer's right to conduct its business as it wishes, including the right to set terms and conditions of employment, in the absence of a collective bargaining agreement. This novel and startling proposition is utterly unfounded (and, we note, is not advanced by the government).

It simply is untenable to suggest that states are free to eliminate the employer's accepted right to impose terms at impasse and thereby upset the fundamental and longstanding balance that federal law has established between the parties in collective bargaining negotiations. Contrary to petitioners' theory, this Court and the NLRB have recognized that the employer "has been given" by federal labor law various "weapons to counterbalance the employees' power of strike," including the "tool[ ] of economic self-help" to "institute unilaterally * * * working conditions [at impasse]." *American Ship Bldg. Co.*, 380 U.S. at 316.[8]

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8 *Fort Halifax*, the authority upon which petitioners rely for this proposition (Pet. Br. 34-35), is not to the contrary. There, in the course of holding that a state's requirement of severance payments to employees of closed plants was not preempted by the NLRA, the Court observed that

> [a]bsent a collective-bargaining agreement, * * * state common law generally permits an employer to run the workplace as it wishes. * * * The parties may enter negotiations designed to alter this state of affairs, but, if impasse is reached, the employer may rely on pre-existing state law to justify its authority to make employment decisions.

What is more, federal labor law exhaustively regulates this area of employer-employee relations. It defines the pivotal concept of impasse (*Bonanno Linen*, 454 U.S. at 412); it precludes employers from unilaterally changing the status quo, even after the expiration of the collective bargaining agreement, until impasse has been reached (*Katz, supra*); it requires that the terms unilaterally imposed after impasse be limited to those proposed to the union during negotiations

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482 U.S. at 21. Read in context and against the backdrop of established federal labor law, this passage simply means that the substantive employment terms an employer may set are a function of state law; an employer cannot pay wages or provide working conditions that are made illegal under the state's police power. See *Metropolitan Life Ins. Co.*, 471 U.S. at 755 (employers cannot "exempt themselves" from state law). But the employer's right unilaterally to impose terms at impasse in collective bargaining negotiations under the NLRA is a federal right, even though the particular terms the employer can impose in the exercise of that federal right are constrained by state law. In other words, the question whether an employer can unilaterally impose terms at impasse is a matter of federal law and is separate from and precedent to the question whether the specific substantive terms it sets are legal as a matter of state law. Although petitioners boldly assert that *Fort Halifax* "negates the Court of Appeals' logic" and fault the majority below for "not even mention[ing] the case" (Pet. Br. 37), the court was correct that the case is essentially irrelevant, and indeed it is not even cited by the government.

This distinction between the federal right to impose unilateral terms at impasse as part of the collective bargaining process, and the state law right to set a particular substantive term, also disposes of petitioners' reliance (Pet. Br. 28-30, 34-37) on *Metropolitan Life Ins. Co., supra*, and *Livadas* v. *Bradshaw*, 114 S. Ct. 2068 (1994). For the same reason, petitioners' discussion of the difference between the "bargaining process" and the "end result of bargaining" in *Metropolitan Life* (Pet. Br. 35-36) gets the Court's decision exactly backwards.

(*NLRB* v. *Crompton-Highland Mills*, 337 U.S. 217, 223-225 (1949); *Katz*, 369 U.S. at 745 & n.12; *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988)); and it determines whether an employer can withdraw from a multiemployer bargaining unit at impasse and whether it can negotiate individual agreements with the union for the interim period of impasse (*Bonanno Linen, supra*). There is no basis to carve out from this web of federal labor law regulation the single issue — and the most fundamental issue — of the employer's imposition of terms at impasse and to commit that question exclusively to the province of state law.[9]

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9 Although the government also emphasizes the application of the nonstatutory labor exemption to collective bargaining agreements, it does not frame the theory of the exemption, as petitioners do, in terms of employee consent or state common law. Rather, it argues that the exemption is limited to "duties" and "obligations" that labor law "requires" of employers (U.S. Am. Br. 17-19); absent such requirements, "[e]mployers are * * * able to comply with both the labor laws and the antitrust laws, and should so comply. * * * After impasse, nothing in employers' specific legal obligations established by the NLRA conflicts with the antitrust laws' prohibition against combinations in restraint of trade." *Id.* at 17, 19; see also *id.* at 23-24. As the government acknowledges (*id.* at 19), this is a reformulation of its "narrow construction" argument, which, as already discussed, is unavailing. Moreover, the government's theory finds no support in the text or reasoning of this Court's decisions. And most importantly, it fails to explain the right of a multiemployer bargaining unit to engage in a post-impasse lockout (since that is not "required" by federal labor law) and thus is inconsistent with *Buffalo Linen*. Indeed, multiemployer bargaining itself is not a "duty" or "obligation" under the NLRA and therefore would appear, contrary to *Pennington* (381 U.S. at 664), to be subject to the antitrust laws under the government's theory. In the end, the government's virtually monolithic focus on the policy of competition would improperly invoke the antitrust laws to

C. Petitioners' Position Would Be Unworkable In Practice And Would Both Distort The Collective Bargaining Process And Deter Multiemployer Bargaining Units.

Petitioners seek (Pet. Br. 40) to reassure the Court that their position leaves adequate alternatives available to employers and would not upset the process of collective bargaining. These assurances are misplaced and provide cold comfort to employers that must deal with the practical implications of the Court's decision. Contrary to petitioners' submission, their position would be unworkable in practice and would both distort the collective bargaining process and deter multiemployer bargaining units.

According to petitioners, each employer in a multiemployer bargaining unit can, at impasse, individually decide "unilaterally to implement its own preferred employment terms *without fear of antitrust liability*, since it is only the *collusive* imposition of restraints that runs afoul of the Sherman Act." Pet. Br. 40 (emphases in original).[10] In reality, employers will

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remove important economic weapons and bargaining strategies that the labor laws allow to employers.

[10] Petitioners also suggest (Pet. Br. 40) that some collectively imposed terms would be upheld under the Rule of Reason if they do not constitute an "unreasonable" restraint of trade. Whatever the applicability of the Rule of Reason in the context of sports leagues — and both petitioners and the government merely note that possibility but conspicuously decline to commit themselves to that position — it would not appear to be applicable in most other industries, where under traditional principles a collective

have two likely choices: either to continue the terms of the now-expired collective bargaining agreement that the multiemployer unit previously accepted, or to impose the terms the multiemployer unit unsuccessfully proposed to the union during negotiations. These were, after all, the terms that commended themselves to at least a majority of the employers, and it can be expected that most if not all of the employers would adhere to them even in the exercise of their individual judgment.

But either course is fraught with antitrust peril. Both alternatives have their origin in a collective agreement among employers in the multiemployer bargaining unit (in either the prior collective bargaining agreement or the negotiating proposals during the current bargaining process). Under petitioners' position, the nonstatutory labor exemption for those concerted activities would lapse upon the expiration of the collective bargaining agreement and the occurrence of impasse in the negotiations. Accordingly, a decision by the employers to impose terms previously set on a collective basis, even if now made by each employer individually, is a virtual invitation for the employees to hale them into court in an antitrust suit. Indeed, petitioners ominously warn of their view (Pet. Br. 30) that "the salaries * * * the clubs may impose upon impasse * * * may not start from a level that is collusively fixed by the clubs in a unilateral effort to eliminate competitive market forces."

It is far from clear whether an employer's individual decision to impose a term previously

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agreement among competitors to set the price they pay for goods or services would be a per se violation of the Sherman Act.

reached through concerted action is, as a legal matter, sufficient to withdraw from the collective agreement and establish independent conduct outside the scope of the Sherman Act. But even apart from that, the parallel decisions of the employers to impose previously agreed-upon terms could readily be alleged as a claim of concerted activity under the antitrust laws and could well necessitate discovery and be enough to get past summary judgment and require submission to a jury at trial. Worse yet, employers in a multiemployer unit will engage in continuing discussions and exchanges of information with each other in the course of the ongoing bargaining process; their post-impasse participation in the multiemployer bargaining process thus will be used as evidence of collusion among individual employers that will provide additional fodder for an antitrust plaintiff. Petitioners therefore present employers in a multiemployer unit with a Hobson's choice: whatever they do, they are likely to find themselves enmeshed in a burdensome and protracted antitrust case, and to face the prospect of treble damages and attorneys' fees, for conduct that, petitioners assure the Court (Pet. Br. 40), may be undertaken "without fear."[11]

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11 These risks are of particular concern because of the substantial burdens of antitrust litigation and the drastic nature of the antitrust remedy of treble damages and attorneys' fees. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344-345 (1979) (noting that antitrust suits "add a significant burden to the already crowded dockets of the federal courts," "impose a heavy litigation burden," saddle defendants with the substantial "cost of defending * * * [such] actions," and pose a danger of "frivolous claims brought to extort nuisance settlements"); *id.* at 345 (Rehnquist, J., concurring) (expressing concern that antitrust suits "'add a substantial volume of litigation to the already strained dockets of the federal courts and could be used to exact unfair settlements from [defendants]'");

This outcome is fundamentally unfair to employers in multiemployer bargaining units. Such unfairness is exacerbated by the fact that the existence of an impasse is not always clear. See *Laborers Health & Welfare Trust Fund*, 484 U.S. at 543 n.5 ("'[i]mpasse is an imprecise term of art'" and "'its application can be difficult'"). If employers erroneously conclude that no impasse has been reached and thus collectively maintain the status quo as the NLRA requires (see *Katz*, *supra*), they will be subject to treble damages.

For the same reason, petitioners' proposal would skew the collective bargaining process. Because of this threat of treble damages liability for collective activity after impasse, employers would have a strong incentive to err on the side of concluding that impasse has occurred. Such premature suspension of negotiations would be inimical to the most basic labor law policies.

Mitsubishi Motors v. *Soler Chrysler-Plymouth*, 473 U.S. 614, 633 (1985) (observing that horizontal antitrust claims "often occasion the monstrous proceedings that have given antitrust litigation an image of intractability"); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 266 (1972) (the remedy of treble damages and attorneys' fees "should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits"); 10 Julian O. von Kalinowski, ANTITRUST LAWS AND TRADE REGULATION § 115.01[1] at 115-3 (1995) (treble damages are a "severe sanction"); E. Compton Timberlake, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS § 3.02 at 13 (1965) ("[G]iving threefold the damage sustained is a drastic remedy * * *. [M]any unfounded actions are brought in the hope that the cost of defending, plus the possible penalty of having to pay treble damages and attorneys' fees, will bring about a settlement"). This case is illustrative: the litigation lasted some four years in the district court and resulted in an award of treble damages of more than $30 million and attorneys' fees of $1.7 million. See Pet. App. 8a-9a.

Petitioners' proposal would further distort the collective bargaining process by giving employees a new and potent economic weapon to use against employers. See *Williams*, 45 F.3d at 689 (for more than 100 years after enactment of the Sherman Act, the practices of multiemployer bargaining units were never challenged). Indeed, employees can strategically utilize antitrust litigation in the midst of collective bargaining whenever — and however often — impasse occurs. See pages 17-18, *supra*.

Perhaps most importantly, petitioners' theory would improperly deter multiemployer bargaining units. In many industries that have multiemployer bargaining, including trucking, employers have considerable latitude to decide, as a matter of business judgment, whether to engage in multiemployer bargaining. In some circumstances, in fact, multiemployer bargaining advances the interests of employees, *e.g.*, by "'facilitat[ing] the development of industry-wide, worker benefit programs.'" *Bonanno Linen*, 454 U.S. at 409 n.3 (citation omitted). Confronted with the virtual certainty of antitrust litigation and potential treble damages liability if (as commonly happens) impasse is reached, prudent employers could well elect to forgo multiemployer bargaining in favor of individual negotiations. Such a forseeable consequence of petitioners' argument could be contrary in some situations to the best interests of employees (*ibid.*), impair "'the efficiency and effectiveness of the collective bargaining process'" (*id.* at 410 n.3), and discourage the use of a multiemployer bargaining process that has proven "in many industries * * * [to be] a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 353 U.S. at 95.

Based on these concerns about the effect of their position on the collective bargaining process, petitioners complain (Pet. Br. 31) that the decision below rests on an impermissible "judicial desire to adjust the balance of power between employees and employers." The court of appeals, however, expressly disclaimed any such ruling. See Pet. App. 31a.

Moreover, for the reasons explained above, the court of appeals' holding is justified by considerations of national labor policy, and in particular by the recognized interest in promoting multiemployer bargaining, and not by an unfettered policy judgment to favor one party or the other in collective bargaining by providing additional economic weapons to strengthen that side's bargaining position. The Court's explanation of this distinction in *Bonanno Linen* is equally apt here (454 U.S. at 418-419):

> [T]he National Labor Relations Act does not constitute the Board as an "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands" * * * or give "the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power." * * * But the Board has refused to enter that proscribed area * * *. Instead, it looked at its statutory mandate and duty — to promote labor peace through strengthened collective bargaining * * *.
>
> * * * [T]he Board in this case has developed a rule which, although it may

> deny * * * a particular economic weapon, does so in the interest of the proper and pre-eminent goal, maintaining the stability of the multiemployer unit.

The unbroken line of multiemployer bargaining cases back to *Buffalo Linen* demonstrates that this is a legitimate concern of federal labor law and, under the nonstatutory labor exemption, is a proper basis to exempt from the antitrust laws the multiemployer action challenged here. Consistent with the basic approach of the labor laws, the court of appeals properly refrained from injecting itself, in the guise of the Sherman Act, into the bargaining relationship and economic contest between employers and unions.[12]

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12 Petitioners also object (Pet. Br. 42) that the court of appeals has forced employees to waive their labor law rights in order to preserve their claims under the Sherman Act. However, as the court correctly observed (Pet. App. 24a), "the inception of a collective bargaining relationship between employers and employees irrevocably alters the governing legal regime." The employees' election to bargain collectively gives them a variety of important rights but, as the nonstatutory labor exemption recognizes, also requires that the conflicting policies of the labor laws and the antitrust laws be reconciled. Thus, the decision below simply reflects the fact that if employees are not unionized, the labor exemption is inapplicable, and accordingly the Sherman Act remains in full force.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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February 16, 1996